

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. ~~77~~ - 1035

CODA LLOYD VICE, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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JURISDICTION AND OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 11, 1977, and the Opinion of the Court is reported at 562 F. 2d 1004. A copy of said Opinion is printed herein as Appendix A. The Order denying the Petition For Rehearing entered on December 22, 1977 is printed herein as Appendix B. The Order granting the Petitioner's Application For Stay Of Mandate is reproduced herein as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(c) since a right has been especially set up and claimed under the constitution of the United States.

QUESTIONS PRESENTED

Can this Petitioner be convicted in 1977 for an 18 U.S.C. 922(a) (6) federal firearms offense, the basis of

which is nondisclosure of a 1966 state felony conviction which has been declared constitutionally void and set aside as of May 6, 1966, the efforts to set aside the state felony conviction being made and accomplished prior to the 18 U.S.C. 922(a) (6) conviction? Under the circumstances above described, does the federal conviction deny the Petitioner his due process guarantees of the Fifth and Fourteenth Amendments?

Has this Petitioner been denied the Sixth Amendment requirement of competent and effective counsel when in 1966 his former attorney allowed him to plead guilty to a felony in state court which was later determined to be no more than a misdemeanor and thus set aside on constitutional grounds, but the prior state felony conviction nevertheless being the basis of the 18 U.S.C. 922(a)(6) federal conviction in 1977?

Is a sentence of three years imprisonment and a two thousand five hundred dollar fine violative of this Petitioner's Eighth Amendment rights under the facts and circumstances of this case in consideration of the proportionality concept?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same of-

fense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI

"In all criminal prosecution, the accused shall enjoy the right of speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV, SECTION 1

"... nor shall any state deprive any person of life, liberty, or property without due process of law...."

FEDERAL STATUTE INVOLVED

18 U.S.C. Section 922(a) (6)

(a) It shall be unlawful —

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

STATEMENT OF THE CASE

On January 2, 1966, when the Petitioner was twenty-four years old, he and two other young men threw a stick of dynamite into a chicken coop owned by a cousin of one of the Petitioner's companions. This prank was in response to the cousin shooting a hog owned by one of the Petitioner's friends. All these actions took place in a rural area of Jackson County, Mississippi, known as the Escatawpa community, where everyone is related in one way or another. The Petitioner and his friends apparently wanted to see "the feathers fly" by throwing this stick of dynamite into the chicken coop, but the cousin got upset because an old tractor parked next to the coop was slightly damaged. The matter was pressed and the Petitioner and his two companions were indicted in April, 1966, by a Jackson County, Mississippi grand jury.

The state indictment supposedly charged a violation of unlawful use of explosives, Section 2143, Mississippi Code 1942 (Presently Section 97-37-25, Mississippi Code 1972), which is a felony. The Petitioner was advised by his then attorney to plead guilty to this felony and he was placed on probation for five years. The Petitioner completed this probation without incident.

On December 1, 1975, the Petitioner purchased two firearms at a department store located in Pascagoula, Mississippi and failed to disclose that he pled to the felony in 1966 and was placed on probation. A federal grand jury on January 11, 1977, indicted the Petitioner for making a false statement in regard to the firearms sale and for receiving firearms. (The Government later dismissed the charge of receiving firearms and further dismissed one charge of making a false statement concerning the firearms acquisition, so the only matter for consideration on this appeal is one violation of 18 U.S.C. 922(a) (6), making a false statement in regard to a firearms transaction).

After this federal indictment, the Petitioner's present attorneys were made aware of the facts of the 1966 incident and immediately realized the Petitioner had committed no felony as outlined by Section 2143, Mississippi Code, 1942, and that he should never have been allowed to plead to the felony charge in 1966. On March 16, 1977, his present counsel filed a Petition For Writ of Error Coram Nobis and/or Motion To Vacate Judgment and Sentence in the Circuit Court of Jackson County, Mississippi. The Petition stated the prior indictment did not constitutionally set out the necessary elements of the crime of unlawful use of explosives, Section 2143, Mississippi Code 1942, and

charged no higher offense than that of malicious mischief and that the indictment should be declared void and the felony conviction set aside and vacated as of May 6, 1966. The actions of the Petitioner and his friends in 1966 evidenced no intent whatsoever to harm anyone, the chicken coop located more than a quarter of a mile away from the nearest house. The Petitioner committed malicious mischief and this was the 1966 state indictment charged, the indictment completely failing to set out the elements of a serious felony, the use of explosives with felonious intent to harm persons.

The Petition for Writ of Error Coram Nobis and/or Motion To Vacate Judgment and Sentence was considered by the State court which vacated and set aside the felony judgment as of May 6, 1966, for failure to constitutionally set forth the elements of a felony, that is, intent to harm persons and reduced the matter to a misdemeanor, malicious mischief, which carries as a sentence a term of six months which is substantially less than that required to be disclosed on the treasury form required to be completed in association with a firearms sale.

The State of Mississippi apparently had no difficulty with this decision to set the felony conviction aside on May 6, 1966, since no appeal was taken from the State court's ruling.

The Petitioner filed a Motion to Dismiss the federal indictment stating that the prior felony conviction was void and had been set aside by the State court as of May 6, 1966, and moved the United States District Court to dismiss the indictment which charged the firearms offense, an element of which is disclosure of the prior felony conviction.

The United States District Judge overruled the Motion to Dismiss. The Petitioner entered a nolo contendere plea to one count of making a false written statement in the acquisition of a firearm and was sentenced to a term of three (3) years imprisonment and a Two Thousand Five Hundred Dollar (\$2,500.00) fine.

An appeal on constitutional grounds was taken to the Aited States Court of Appeals for the Fifth Circuit and was affirmed by that Court as set forth in the opinion made part of this Petition as Appendix A.

The United States Court of Appeals for the Fifth Circuit granted the Petitioner a stay of the mandate pending a determination by this Court on the Petition for Writ of Certiorari. A copy of the Order Staying the Mandate is included in this Petition as Appendix C.

ARGUMENT

I.

The Use Of A Constitutionally Void Prior State Conviction As A Basis Of An 18 U.S.C. 922(a) (6) Violation Denies The Petitioner His Due Process Guarantees Of The Fifth And Fourteenth Amendments When The Prior State Conviction Has Been Set Aside And Declared Void As Of A Date Eleven Years Prior To The Petitioner's Nolo Contendere Plea On The Federal Charge, The Efforts To Set Aside The State Conviction Being Made And Accomplished Prior To The Plea Or The 18 U.S.C. 922(a) (6) Offense

In this case, the Petitioner entered a nolo contendere plea to a federal indictment which charged he failed to disclose on Treasury Form 4473, required to be completed in a firearm acquisition, a 1966 state conviction, the failure to disclose constituting a violation of 18 U.S.C. 922(a) (6).

Subsequent to this Petitioner being indicted on the 922 (a) (6) charge, but prior to his plea on said offense, his present attorneys recognized he had committed no more than a misdemeanor in 1966 and promptly set in motion the steps to have the 1966 felony conviction set aside. The judge of the Circuit Court of Jackson County, Mississippi found the 1966 felony conviction was constitutionally void as a result being based on an indictment which did not set forth the requisite elements of the serious crime charged and thus failed to meet Sixth Amendment standards and further failed to meet due process requirements. *United States v. Auerbach*, 420 F. 2d 921 (5th Cir. 1969), *Grimsley v. United States*, 50 F. 2d 509 (5th Cir. 1931), and *Carter v. United States*, 173 F. 2d 684 (10th Cir. 1942). The 1966 conviction was set aside and declared constitutionally void as of May 6, 1966, the date the Petitioner originally entered a plea and was placed on probation. The State court reduced the matter to a misdemeanor, malicious mischief, an offense in Mississippi which carries a penalty, a time period of six months, which does not have to be disclosed on Treasury Form 4473, which requires disclosure of any conviction of a crime punishable by imprisonment for a term exceeding one year.

The United States District Judge overruled the Petitioner's Motion To Dismiss, said Motion stating that the prior felony conviction was void and had been set aside as of May 6, 1966, and the federal indictment,

which charged firearms offense, should be dismissed since as an element of the offense is the disclosure of a prior felony conviction and the prior conviction had been set aside and declared constitutionally void as set forth above.

The issue thus presented is whether this Petitioner can be faced with a three year prison sentence and a two thousand five hundred dollar fine for a violation of 18 U.S.C. 922(a) (6), when the prior state conviction, which is the basis of federal offense, has been set aside and declared constitutionally void as of a date almost eleven years prior to the nolo contendere plea on the 18 U.S.C. 922(a) (6) charge.

This Court has prohibited the use of void prior convictions to prove an untruth or to sustain an additional penalty. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. 2d 799, (1963); *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); *United States v. Tucker*, 409 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972) and *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972). This case is certainly analogous, the Government relying on a constitutionally void conviction as a basis of the 18 U.S.C. 922(a) (6) charge.

It should be pointed out that there exists a conflict of decisions between the Sixth Circuit and the Fifth Circuit concerning the question presented here. In *United States v. Fryer*, 402 F. Supp. 831 (N.A. Ohio 1975) and *United States v. Fryer*, 545 F. 2d 11 (6th Cir. 1976), the facts are as follows: Fryer pled guilty to a smuggling violation in September of 1971. On September 1, 1974, Fryer purchased a firearm and did not disclose his 1971 conviction. He pled guilty in April, 1975 to an 18 U.S.C. 922(a) (6) violation. After this conviction, Fryer's attorneys recognized he had

been incorrectly sentenced as an adult in 1971 instead of as a youth offender and that the matter should be set aside. The trial court determined a mistake had been made and a nunc pro tunc order setting aside the conviction was entered as of June 22, 1973, a date prior to the 1974 firearms violation. The Sixth Circuit upheld the District Court's ruling in the *Fryer* case. The Government did not appeal to this court from the Sixth Circuit's decision in *Fryer*.

This case is the same as *Fryer* except in *Fryer*, the Defendant set aside his prior conviction after his 18 U.S.C. 922(a) (6) conviction in 1975. The Petitioner herein had his prior felony set aside on constitutional grounds as of May 6, 1966, and this was accomplished before he entered his nolo contendere plea in the firearms case.

The legal determinations as set forth by the trial court in *Fryer* are very important in regard to this present case and are set forth here:

"This Court is also unpersuaded by the Government's argument that even if it is held that the Section 1202(a) conviction must be set aside, the same is not true of the Section 922(a) (6) and 924(a) convictions. The essence of these charges is knowingly and falsely giving a statement intending to deceive a firearm dealer. To prove this, the Government would have to show that the Defendant had been previously convicted since it alleges he falsely told the dealer that he has not. *It does not matter that the Defendant actually believed that he was a convicted felon when he told the*

firearms dealer he was not a convicted felon. One can not know something that is not so. What he told the firearms dealer was true whether he believed it to be or not. The Defendant's conviction will be set aside." (Emphasis ours). 402 F. Supp. 831 (N.A. Ohio 1975)

The Petitioner Vice had his prior felony set aside on constitutional grounds as of May 6, 1966. Whether the Petitioner believed he was a felon at the time of the firearms transaction does not matter as the court well reasoned in *Fryer*. Legally and constitutionally Vice was not a convicted felon whether he believed it or not. The State court could not have set aside his conviction without a finding that he had not committed a felony. The State Court found the Petitioner had committed no more than a misdemeanor and so ruled when setting aside the felony conviction as of May 6, 1966.

II.

The Petitioner Was Denied His Sixth Amendment Right To Competent And Effective Counsel When In 1966 His Former Attorney Allowed Him To Plead To A Felony Charge Which Was Later Clearly Determined To Be Only A Misdemeanor And Thus Set Aside. But Now The Prior Felony Being The Basis Of A 18 U.S.C. 922(a) (6) Violation

The Petitioner's present predicament is due to incompetent and ineffective legal counsel who in 1966 advised the Petitioner, who was young and uneducated, to plead to a felony indictment which on its face set forth facts which constituted only a misdemeanor, malicious mischief.

In 1966, the Petitioner and his friends threw a stick of dynamite into a cousin's chicken coop. This prank was in retaliation to the cousin shooting a hog owned by one of the boys. The chicken coop was more than a quarter of a mile from the nearest house and there was never any intent to harm persons, a necessary element of the serious felony outlined in the Mississippi statute. The state indictment on its face failed to indicate the elements of a felony. The least amount of legal research would have shown the Petitioner and companions had committed no felony, yet the Petitioner was advised to plead guilty and was placed on five years probation.

The Circuit Court of Jackson County, Mississippi set aside the felony conviction and declared the Petitioner had only committed a misdemeanor. The State of Mississippi did not appeal this decision.

Eleven years later the Petitioner is now facing a prison sentence because an attorney in 1966 allowed him to plead to a felony which was no more than a misdemeanor. The felony was set aside in 1977 on constitutional grounds as outlined above, but the conviction has nevertheless been used by the Government as the basis of the 18 U.S.C. 922(a) (6) charge.

The Sixth Amendment requires not only representation by counsel at all critical stages of a criminal proceeding but competent and effective counsel as well. *United States v. De Coster*, 487 F. 2d 1197 (DC 1973); *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974), and *Herring v. Estelle*, 491 F. 2d 125 (5th Cir. 1974).

III.

A Sentence Consisting Of A Three Year Prison Term And A Two Thousand Five Hundred Dollar Fine Is Disproportionate And Excessive And Amounts To Cruel And Unusual Punishment Under The Eighth Amendment Of The United States Constitution

In this case, the Petitioner Coda Lloyd Vice, Jr., is a thirty-six year old man who is married, and has four children and has lived in the community of Escatawpa, Mississippi, all his life. While only obtaining a ninth grade education, he has built his own trucking business to a fleet of forty trucks and employs in his business between forty and fifty persons.

The Petitioner Vice pled guilty to a conviction eleven years ago in state court, the said conviction having been set aside as of May 6, 1966, under the circumstances as set forth in this Petition. He was placed on probation in 1966 and has never spent a minute in prison.

He has now been sentenced to three years in prison and a two thousand five hundred dollar fine for a violation of 18 U.S.C. 922(a) (6).

It is the contention of the Petitioner that the sentence of the United States District Court in this matter is disproportionate and excessive and in violation of the Eighth Amendment of the United States Constitution, which prohibits cruel and unusual punishment.

The Petitioner's prior felony conviction has been set aside and the charge reduced to a misdemeanor. He is

now being sentenced to a federal prison term of three years for nondisclosure of a conviction which has been determined to be a misdemeanor carrying a term not exceeding one year.

Even if one, for argument's sake, follows the Government's contention that the Petitioner was a convicted felon at the time of the firearms transaction, he was not in any respect a convicted felon in regard to the state charge at the time of sentencing in the United States District Court. The 1966 felony charge was declared unconstitutionally void by the Mississippi Court, and the Petitioner has no felony in his past.

As the United States Court of Appeals for the Fourth Circuit stated in *Hart v. Coiner*, 483 F. 2d 136 (4th Cir. 1973), "a concededly valid statute may be applied in a particular case in such a way as to violate constitutional provisions". The Court of Appeals further stated in *Hart*:

While it seems settled that punishment must be proportioned to the offense committed, application of this principle to a particular fact situation is not without difficulty. That the proportionality concept is not static, but is "progressive" one which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958).

If 18 U.S.C. 922(a) (6) is in fact a valid statute, a sentence of three years imprisonment and two thousand five hundred dollar fine for a violation thereof

under the circumstances of this "particular case" amounts to an excessive sentence. The whole concept behind the gun control statutes is to keep firearms from the criminal element, those persons with prior felonies that are in fact a danger to society. The Petitioner is a family man and a self-made businessman, not a dangerous felon deserving of a federal prison sentence for nondisclosure of an offense determined to be no more than a misdemeanor, committed eleven years prior when he was but a young man.

The sentence in this case violates Eighth Amendment standards.

CONCLUSION

Wherefore, it is respectfully submitted that this Court should grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BOYCE HOLLEMAN,
ATTORNEY AND COUNSELLOR
AT LAW
1913 15th STREET
P. O. DRAWER 1030
GULFPORT, MISSISSIPPI 39501
ATTORNEY FOR PETITIONER

CERTIFICATE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D. C. 20530, and to Honorable Robert E. Hauberg, United States Attorney, Post Office Box 2091, Jackson, Mississippi, 39205.

THIS, the ____ day of January, A.D., 1978.

OF COUNSEL

APPENDIX A

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Coda Lloyd VICE, Jr.,
Defendant-Appellant.**

**No. 77-5283
Summary Calendar.***

**United States Court of Appeals, Fifth Circuit.
Nov. 11, 1977.**

**Appeal from the United States District Court for the
Southern District of Mississippi.**

**Before THORNBERRY, CLARK and HILL, Circuit
Judges.**

PER CURIAM:

Defendant was convicted on a plea of nolo contendere for knowingly making a false statement in the acquisition of a firearm, in contravention of 18 U.S.C.A. § 922(a)(6) (1976). When he bought the firearm in 1975, defendant stated that he had never been convicted by any court of a crime punishable by a prison term exceeding one year when in actuality he had been convicted of such a crime by a state court on May 6, 1966. After indictment but before trial of the federal offense, the state court that had previously convicted defendant voided that conviction on constitutional grounds as of the date of the conviction.

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Defendant argues that the statement made while acquiring the firearm was not false since the original conviction had been set aside and declared void as of a date prior to the firearm transaction and that therefore no violation of § 922(a)(6) had occurred. In *United States v. Ransom*, 545 F.2d 481 (5th Cir. 1977), this court held to the contrary. At the time defendant made the statement and failed to reveal the existence of a prior conviction, the statement was false. That the prior conviction was later set aside on constitutional grounds does not obviate the requirement imposed by § 922(a)(6) "to tell the truth about the conviction." 545 F.2d at 484. Defendant's reliance on *United States v. Fryer*, 402 F.Supp. 831 (N.D.Ohio 1975), aff'd 545 F.2d 11 (6th Cir. 1976) is misplaced. In *Fryer* the prior conviction had already been set aside by operation of law under the Youth Corrections Act, 18 U.S.C.A. § 5021(b) (1969) before the firearm acquisition. Thus no outstanding conviction was in existence at the time the statement was made. Since the defendant's statement in this case was false at the time it was made, *Ransom* dictates that the conviction be affirmed.

Defendant also argues that his sentence of a three-year prison term and a two thousand five hundred dollar fine is disproportionate and excessive and amounts to cruel and unusual punishment under the eighth amendment. Assuming without deciding that this issue is properly before us, see *United States v. Tallant*, 547 F.2d 1291 (5th Cir. 1977) (holding only jurisdictional defects to be appealable after a conviction founded on a nolo contendere plea), we refuse to disturb the sentence. The sentence itself is within the statutory limits and therefore is not subject to appellant review. *Herron v. United States*, 551 F.2d 62 (5th Cir. 1977); cf. *United States v. Hartford*, 489 F.2d

652 (5th Cir. 1974) (appellate review is limited to the judicial process by which the sentence was determined). Moreover, under the circumstances of this case the imposition of a sentence within the statutory limits cannot be said to be "so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice," the standard for an eighth amendment violation. See *United States v. Bondurant*, 555 F.2d 1328, 1329 (5th Cir. 1977). The defendant may, of course, seek relief from the sentencing judge by a motion for reduction of sentence pursuant to Fed.R.Crim.P. 35.

AFFIRMED.

APPENDIX B

ON PETITION FOR REHEARING

(Number and Title Omitted)

Filed: December 22, 1977

Before THORNBERRY, CLARK and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

APPENDIX C

ORDER

(Number and Title Omitted)

Filed: January 4, 1978

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 21, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ CHARLES CLARK
United States Circuit Judge

No. 77-1035

Supreme Court, U. S.
FILED

MAR 21 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
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v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 562 F. 2d 1004.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. A petition for rehearing was denied on December 22, 1977. The petition for a writ of certiorari was filed on January 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(c); the correct section is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person may be convicted of making a false statement in connection with the acquisition of a firearm when he falsely denies at the time of acquisition

(1)

that he has been convicted of a felony, but the outstanding state felony conviction is subsequently set aside on the ground that the state indictment charged a misdemeanor.

2. Whether petitioner received an excessive sentence.

STATEMENT

After entering a plea of *nolo contendere*, petitioner was convicted in the United States District Court for the Southern District of Mississippi of one count of making a false written statement in the acquisition of a firearm, in violation of 18 U.S.C. (1970 ed.) 922(a)(6). He was sentenced to a term of three years' imprisonment and fined \$2,500. The court of appeals affirmed (Pet. App. 1a-3a).

On December 1, 1975, petitioner purchased a revolver from a licensed firearms dealer in Pascagoula, Mississippi. During the transaction, petitioner signed the required Treasury Department form, in which he certified that he had not been convicted of a crime punishable by a term of imprisonment exceeding one year. In May 1966, however, petitioner had pleaded guilty in Jackson County, Mississippi, to a charge of willfully and feloniously bombing a tractor and was sentenced to five years in the state penitentiary, which was suspended in favor of probation (Tr. 31-33). The sentence recited that petitioner had pleaded guilty to the crime of "Unlawful Use of Explosives."¹

¹Section 97-37-25 of the Criminal Laws of Mississippi (1972), "Explosives-unlawful use," prohibits the planting of bombs in any building or vehicle where goods are being stored or where persons are located or being transported. This statute provides a penalty of imprisonment for any term as the court, in its discretion, may determine, or for punishment of death if such a penalty is fixed by the jury.

After the instant indictment (charging petitioner with making a false statement in the acquisition of a firearm) was returned on January 11, 1977, and before trial was scheduled to commence, petitioner filed a petition to vacate the state court judgment in the circuit court of Jackson County, Mississippi. On March 17, 1977, the state circuit court sustained the motion, finding that the original indictment charged only the misdemeanor of malicious mischief² and that defendant had pleaded guilty only to a misdemeanor. The court vacated the felony judgment and changed the sentence to six months in the county jail, reducing the sentence to the time previously served on probation.

Thereafter, pursuant to an agreement with the government, petitioner entered a plea of *nolo contendere* in the present case in return for dismissal of two other counts (Tr. 50).³ The court accepted the plea, finding that a factual basis for the plea existed and that the plea was knowingly and voluntarily made.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that he could not be convicted for falsely denying the existence of a prior state felony conviction in connection with the acquisition of a firearm because the felony conviction was later vacated

²Section 97-17-67 of the Criminal Laws of Mississippi (1972) proscribes the crime of malicious mischief. The penalty for this offense is a fine of double the value of the property destroyed or damaged, or imprisonment in the county jail for a period not exceeding twelve months.

³The other two counts charged petitioner with other offenses arising out of the acquisition of the same firearm.

before his trial on the federal charge.⁴ As the court of appeals correctly concluded (Pet. App. 2a), however, the fact that the prior conviction was subsequently set aside "does not obviate the requirement imposed by §922(a)(6) 'to tell the truth about the conviction.' "

The statute under which petitioner was convicted, 18 U.S.C. (1970 ed.) 922(a)(6), makes it unlawful for any person "knowingly to make any false or fictitious oral or written statement" in connection with the acquisition of a firearm. The statute was passed as part of the Gun Control Act of 1968, comprehensive legislation designed to cut back the possession of firearms by unreliable persons. As reflected in its legislative history, carefully reviewed in *United States v. Graves*, 554 F. 2d 65 (C.A. 3) (*en banc*), this provision "places an obligation on all prospective gun purchasers to provide full and honest information, and bars false statements in firearms transactions" (*id.* at 75). Examining the statute and legislative history, the Sixth Circuit has concluded (*Cassity v. United States*, 521 F. 2d 1320, 1323):

We are unable to believe that Congress intended that a prospective purchaser of a firearm under this section is entitled to conceal the fact of a prior conviction, even if a claim of constitutional invalidity is subsequently established. Nor can we believe that

⁴There is no question that the statement was false when it was made. Petitioner's previous conviction resulted in a suspended sentence of imprisonment for five years in the penitentiary. His sentence recited that he had pleaded guilty to the crime of unlawful use of explosives. This is a felony under Section 97-37-25 of the Criminal Laws of Mississippi and the indictment charged that he had feloniously bombed a tractor.

any person filling out the requisite form would conclude that he was not required to make disclosure under such circumstances.

See also *United States v. Ransom*, 545 F. 2d 481 (C.A. 5), certiorari denied, October 17, 1977 (No. 76-6261).

Although his prior felony conviction was later set aside, that does not relieve petitioner from the consequences of previously making a false statement denying it. The fact of an earlier conviction, like the fact of an indictment, has a rational bearing on the fitness of a person to possess a gun, at least until the conviction is set aside. Given the serious problem of controlling crimes committed with firearms, and given the relatively modest nature of the regulatory intrusion on individual prerogatives, it is surely reasonable of Congress to require the fact of an earlier conviction to be disclosed before a firearms transaction is completed. If the prior conviction is for some reason believed to be defective, inquiry can be made or action taken to determine whether it should properly bar the applicant's acquisition and possession of a firearm. By falsely denying the fact of the prior conviction, however, petitioner improperly arrogated to himself the function of assessing his qualification to acquire the firearm. In sum, having neither sought nor obtained relief from his conviction at the time of a false statement, a purchaser may not choose simply to treat the conviction as if it did not exist and misrepresent his criminal record in his efforts to obtain a firearm.

We note that the Ninth Circuit has held, relying on *Burgett v. Texas*, 389 U.S. 109, and similar cases, that a defendant cannot be convicted under Section 922(a)(6) for denying the existence of a prior felony conviction when he was not represented by counsel during the earlier proceedings. See *United States v. O'Neal*, 545 F. 2d 85;

United States v. Pricepaul, 540 F. 2d 417. It is undisputed, however, that petitioner in this case was represented by counsel when he pleaded guilty to the felonious bombing charge. While petitioner now contends that such counsel provided ineffective assistance, an issue not raised below and thus not properly before this Court (see *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2), no court has held that such a claim constitutes a defense to a Section 922(a)(6) charge.⁵ Nor has any court provided relief because it was later determined that the earlier indictment failed to set forth sufficient facts to establish a felony. Thus, we do not believe that there is a genuine conflict in the circuits on the issue raised in this petition.⁶

2. Petitioner also contends (13-15) that his sentence was excessive. It is well settled, however, that an appellate court generally will not disturb a sentence within the range provided by statute. See *Gore v. United States*, 357 U.S. 386; *Dorszynski v. United States*, 418 U.S. 424, 440-441. In this case, where petitioner received a term of three

⁵We note that the state court did not invalidate petitioner's earlier conviction on this ground. Indeed, despite later events, it may be argued that counsel did not render ineffective assistance by failing to argue that petitioner endangered no persons, since the Mississippi Supreme Court has held that danger to persons is not an essential element of the crime. See *Tarrants v. State*, 236 So. 2d 360, 365-366, citing *Rogers v. State*, 89 So. 2d 860, 861-863.

⁶The decision below is not in conflict with *United States v. Fryer*, 545 F. 2d 11 (C.A. 6), on which petitioner relies (Pet. 9-11). In *Fryer* the court of appeals noted (545 F. 2d at 13) that the defendant's earlier conviction had been automatically vacated by operation of law prior to his purchase of a firearm. In the present case, it was never contemplated at the time of petitioner's earlier conviction that it would subsequently be voided upon satisfaction of certain conditions, and no such automatic vacation had occurred. Thus, although we disagree with the result in *Fryer*, it presents a different case from the one at issue here.

years' imprisonment out of a possible five years and was fined only one-half of the maximum five thousand dollar fine, 18 U.S.C. 924(a), there are no exceptional circumstances that support a departure from this rule. Rather, the pre-sentence report showed that petitioner was a repeated offender, possessing at that time 25 convictions for misdemeanors, including assault and battery charges (Probation Report at 3-4).⁷

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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⁷Even petitioner's own counsel admitted that the Probation Report was "adverse" to petitioner (Tr. 47). In fact, petitioner's state probation officer had twice petitioned the state court to revoke probation because of petitioner's violent activities (Probation Report at 2).